

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

FILED BY 4 D.C.  
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ROBERT R. DI TROLO  
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BERNADETTE CUNNINGHAM and )  
ROSALIND JOHNSON, Individually and )  
as Administratrix of the Estate of )  
NEKEYA MAGSBY, Deceased, )

Plaintiffs, )

VS. )

No. 04-1144-T/An

MICHELIN NORTH AMERICA, INC., )  
and MICHELIN AMERICAN )  
RESEARCH & DEVELOPMENT )  
CORPORATION, )

Defendants. )

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ORDER DENYING MOTION TO STRIKE OR EXCLUDE EXPERT REPORT

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The defendants in this product liability action have filed a motion asking the Court to strike or exclude an expert report submitted by plaintiffs' expert, David Osborne. Plaintiffs filed a response to the motion, and defendants countered with a reply.

Plaintiffs served Osborne's original expert report on the defendants on February 18, 2005, in accordance with the scheduling order. On April 4, 2005, one week beyond the deadline for supplementing expert reports, plaintiffs faxed to the defendants an additional report prepared by Osborne. Defendants contend this additional report should be excluded because it was unjustifiably late and is unfairly prejudicial, and also because it is not

probative.

Plaintiffs state that although Osborne's April 4 report does not concern the specific tire that is involved in this litigation, it does concern the companion tires that were on the vehicle at the time of the accident. Plaintiffs contend that the report is supplemental in that Osborne proffered no new theories but found the same defects in the companion tires as in the subject tire. Plaintiffs also contend that one of the reasons the report was seven days late is that Osborne resides in the United Kingdom. Defendants downplay this fact, stating that Osborne is frequently in the United States providing expert testimony in cases such as this. That may be true, but it does not change the fact that if Osborne is not actually in the United States it could take plaintiffs longer to communicate with him and obtain his reports.

The Court finds that a delay of one week in supplementing Osborne's expert report is not significant and that the plaintiffs have substantially complied with the scheduling order. Therefore, exclusion is not justified on that basis.

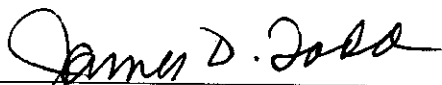

Defendants also contend that they have been prejudiced, as they did not have sufficient opportunity for their experts to examine Osborne's April 4 report prior to submitting their own expert reports, which were due on March 18, 2005. However, the deadline for supplementing expert reports, for both parties, was March 28, 2005. Even if Osborne's report had been timely, it could still have come after defendants' own expert reports were served.

The Court also notes that the defendants were able to depose Osborne regarding his

reports on April 15, 2005. Defendants now argue, in their reply, that they were unable to sufficiently address the supplemental report during the deposition because of the delay.<sup>1</sup> However, any prejudice defendants suffered from the one-week delay may warrant an extension of the discovery deadlines; it does not warrant complete exclusion of Osborne's report.

Defendants also briefly argue that the April 4 report is not probative, as it concerns only the companion tires rather than the specific tire that is the subject of the litigation. However, as Osborne appears to have found the same defects in all the tires, the Court declines to exclude the report on that basis at this time.<sup>2</sup>

Defendants' motion to strike or exclude plaintiffs' expert report is DENIED.  
IT IS SO ORDERED.

  
\_\_\_\_\_  
JAMES D. TODD  
UNITED STATES DISTRICT JUDGE  
  
\_\_\_\_\_  
DATE

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<sup>1</sup> The defendants' motion to exclude appears to have been prepared prior to Osborne's deposition on April 15, even though it was not filed until May 3. The reply, prepared and filed after the deposition, asserts that the defendants were "blindsided" with a report proffering a "whole new theory of defect" on the morning of Osborne's deposition. However, the defendants do not provide any description of the contents of that report, and it is unclear how that report is related, if at all, to the one served on April 5. If that report is not the same one addressed in the original motion to exclude, any issues related to it have not been fully briefed; therefore, the Court's ruling addresses only Osborne's April 5 report.

<sup>2</sup> Defendants have stated that they intend to file a motion in limine on this issue.



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This notice confirms a copy of the document docketed as number 56 in case 1:04-CV-01144 was distributed by fax, mail, or direct printing on June 24, 2005 to the parties listed.

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